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ABSTRACT

A number of court cases are being decided and laws are being passed that have an impact upon the First Amendment rights of children in the United States. In addition, groups such as the national Parent Teachers Association, Action for Children's Television, the Council on Dental Health, and the American Public Health Association are lobbying for legislation that would limit the types of communication available to children. The U. S. Congress in turn is pressuring federal agencies like the Federal Communications Commission and the Federal Trade Commission to make rules defining material permissible for children's consumption. Although this trend seems to be gathering momentum, there are as yet no mechanisms for defining what the rights of the children are and no approach that allows for the uniform application of those rights. The "heightened judicial scrutiny test" would give lawmakers and judges alike guidelines to be used in insuring society's interest in the protection of children and the child's interest in becoming an informed member of the adult society. The heightened judicial scrutiny test involves answering two questions: (1) Does the regulation at issue serve an important government objective? and (2) Is the regulation substantially related to the achievement of that objective? (RL)

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# Toward a Theory of the First Amendment Rights of Children

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# TOWARD A THEORY OF THE FIRST AMENDMENT RIGHTS OF CHILDREN

## Introduction

The legal area of children's* rights under the First Amendment to the Constitution of the United States is unexplored and judicially undeveloped. An initial analysis of the area reveals two basic facts. First, the courts have not yet articulated any special factors that might determine how existing legal mechanisms for analyzing the First Amendment rights of adults can be applied to minors. Second, the constitutional tests of equal protection traditionally used to determine if an adult has been afforded civil rights are themselves, as will be shown, in a state of flux.

In order to delineate and provide a means of discussing the First Amendment rights of children, this paper proposes a test, the "heightened judicial scrutiny test," which can then be used as a legal litmus in the area of children and the First Amendment: various laws and court decisions concerning minors can be measured against the test with the goal of developing a unified approach to the First Amendment rights of children.

## The Constitutional Rights of Children

An examination of the rights that adhere particularly to children quickly reveals that the notion of a special legal status for minors and the attendant protectionist attitude that our society takes toward them is a relatively recent phenomenon. Until the seventeenth century no special emphasis was given to childhood as a separate phase of the life cycle. "Obviously infants needed special care and attention, but once they had been weaned and had achieved a minimum of ability to take care of themselves, they became "small adults"--mingling, working and playing with mature people."[1] As the French intellectual historian Phillip Aries has pointed out:

> In the middle ages...and for a long time after that in the lower classes, children were mixed with adults as soon as they were considered capable of doing without their mothers or nannies, not long after a tardy weaning (in other words at about the age of seven). They immediately went straight into the great community of men, sharing in the work and play of their companions, old and young alike.[2]

In the seventeenth century, attitudes toward children changed. Clergymen and humanitarians of this time encouraged the separation of children from adults, and, as these thinkers influenced parents, a whole new attitude toward the child resulted. The child emerged as a special person, primitive, irrational and innocent.[3]

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*"Children" is used generically to refer to all persons who have not reached the age of majority. "Minors" is used interchangeably with "children/"

But this increase in concern for the welfare of children had as a corollary the legal notion that minors were the charges of the family and the state, and legally unable to act for themselves.

> In colonial America children were treated as servants, owing strict obedience to their parents and holding positions of complete subservience within the family unit. The common law did not distinguish between the infant and the mature teenager, categorizing both as minors and generally treating them as the "property" of their parents, who could make any and all decisions affecting them.[4]

Although this view of children has been rejected by the United States Supreme Court in recent years,[5] the Court has still not analyzed the "totality of the relationship of the minor and the State."[6]

The Court has recognized that children "are 'persons' under our Constitution,"[7] and that they "are possessed of fundamental rights which the state must respect."[8] Similarly, it has stated that "Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights."[9]

But other than these very general statements, the Court has provided little commentary regarding how and to what extent the rights of adults apply to children. Recently, the Court, in dealing with minor's attempts to receive medical services without parental consent, has taken the opportunity to comment somewhat more specifically on the rights of children. For this reason the case containing these comments, Bellotti v. Baird[10], invites examination.

The issue the Court faced in this case, which was decided in July, 1979, was the constitutionality of a Massachusetts statute that required unmarried minor girls desiring an abortion to first attempt to gain approval of both parents and subsequently to petition a judge if one or both parents refused consent.

The Court began its eight-to-one majority opinion written by Mr. Justice Powell with a statement about the rights of children: "A child, merely on account of his minority, is not beyond the protection of the Constitution....Whatever may be their precise impact, neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."[11]

But the Court went on to quickly quote Mr. Justice Frankfurter's 1953 statement that "Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a state's duty toward children."[12]

Why can the rights of children be limited? The Court articulates three reasons that make the limitation acceptable. First is the peculiar vulnerability of children. The Court points out that this factor has led to the establishment of a system of juvenile courts, an arrangement that is constitutionally permissible: "The State is entitled to adjust its legal system to account for children's vulnerability and their needs."[13]

The second reason for such limitations is the "inability of children to make critical decisions in an informed, mature manner."[14] Here the Court referred to past decisions in which it has held that "the States validly may limit the freedom of children to choose for themselves in the making of important, affirmative choices with potentially serious consequences."[15]

The last reason is the importance of the parental role in child-rearing. The Court noted that the tradition of parental authority, long accepted by our legal system, "is not inconsistent with our tradition of individual liberty."[16]

Having so outlined the rights of children and the instances in which those rights may be limited, the Court held the Massachusetts law unconstitutional because it failed to provide an alternative permission procedure for those minors who did not want to seek parental authorization. The Court felt that the state law unduly burdened the minor's fundamental right to abortion, especially in light of the time factor: "A pregnant adolescent....cannot preserve for long the possibility of aborting, which effectively expires in a matter of weeks from the onset of pregnancy."[17]

Because of the unique nature and consequences of an abortion decision, the Court was loathe "to give a third party an absolute, and possibly arbitrary, veto over the decision..."[18] Wading farther into the delicate issue of the parent's right to make such a decision for his child, the Court admonished the state "to act with particular sensitivity when it legislates to foster parental involvement in this matter."[19] (Emphasis added.)

To summarize Bellotti, the case would seem to yield three important points: (1) the rights of children may be different from those of adults in arrangements such as the juvenile court system, in instances in which children could make critical decisions that could result in their harm, and in cases that defer to parental authority; (2) when a right may effectively expire due to a time factor, the state must use extreme care in the exercise of its authority; and (3) although the Court accords great respect to the role of parents in the upbringing of their children, the state must be sensitive when it fosters parental involvement in the exercise of rights of the minor.

With Bellotti as a backdrop, it is productive to examine two instances in which the Court has specifically dealt with the involvement of children in First Amendment issues.

## The First Amendment Rights of Children

Ginsberg v. New York[20] tested the constitutionality of a state law which prohibited the sale to minors under 17 years of age material defined to be obscene on the basis of its appeal to children. At the outset of the case, New York determined that the "girlie" magazines sold to a minor in this case would not be considered obscene for adults. Thus, the issue the Court faced was not whether such material could be sold to adults, but rather if a state could apply different standards for determining what is obscene for children.

In determining that the state does have the power to adopt what has been termed "variable obscenity" standards,[21] the Court pointed out the general authority of legislatures:

> That the State has power to make that adjustment (i.e., differing standards for obscenity) seems clear, for we have recognized that even where there is an invasion of protected freedoms "the power of the state to control the conduct of children reaches beyond its authority over adults.[22]

This authority derives from two interests. The first is the right of parents to control their children:

> [C]onstitutional interpretation has consistently recognized that parents' claims to authority in their own households to direct the rearing of their children is basic in the structure of our society. . . . The legislature could properly conclude that parents and others, teachers, for example, who have this primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility. . . .Moreover, the prohibition against sales to minors does not bar parents who so desire from purchasing the magazines for their children.[23]

The second interest promoted by this law is the concern of the state itself for the well-being of its youth:

> [T]he knowledge that parential control or guidance cannot always be provided and society's transcendent interest in protecting the welfare of children justify reasonable regulation of the sale of material to them. It is, therefore, altogether fitting and proper for a state to include in a statute designed to regulate the sale of pornography to children special standards. . .[24]

Finally, the Court pointed out that since "obscenity is not within the area of protected speech and press,"[25] this statute does not invade constitutional rights. For this reason, the Court rejected the assertion by New York that the sale of such material to minors poses "a clear and present danger to the people of the state,"[26] and noted that such a test is not required where unprotected speech is at issue.

Application of the "clear and present danger doctrine" would compel the state to demonstrate a showing of circumstances which could lead to violence. The Court was skeptical about this link and registered doubt that "this finding by New York expressed an accepted scientific fact."[28] Nevertheless, the law is upheld because the law promotes the legitimate interest of the State in its youth.

In his concurring opinion, Mr. Justice Stewart sums up the underlying philosophy of the majority:

> I think a State may permissibly determine that, at least in some precisely delineated areas, a child. . .is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees. It is only

> upon such a premise, I should suppose, that a State may deprive children of other rights--the right to marry, for example, or the right to vote--deprivations that would be constitutionally intolerable for adults.[29]

In contemplating the implications of Ginsberg, two factors must be kept in mind. The first is that in using obscenity doctrine to hold the statute valid, and not some other ground, such as the Fourth Amendment, the Court was in a sense, since obscenity is not protected speech, making this a non-First Amendment issue; therefore, the ability of the states to regulate the reading matter of minors is a limited one. "Ginsberg should not be read to support broad state restrictions on the access of minors to nonobscene material such as violent films even if the state reasonably judges them to be injurious to minors."[30]

The second factor is that the New York statute was very narrowly drawn. It only restricted visual material of a specific nature and said nothing whatever about the publication of ideas.[31]

The next case under review dealt with communication which was very clearly within the ambit of the First Amendment.

Tinker v. Des Moines Independent School District[32] grew out of a ruling by public school officials that prohibited students from wearing black armbands as symbols of their sentiments against the Vietnam war. In its adjudication of the case, three facts were emphasized by the Supreme Court: first, only seven out of 18,000 Des Moines school children chose to wear the arm bands; second, the administrators' contention that a disturbance that would interfere with school discipline would result from the display was not realized; and third, students in the schools prior to this incident had been allowed to wear political symbols such as the Nazi Iron Cross and national political campaign buttons.

In its opinion, which held unconstitutional the ruling of the school administrators, the Court took the opportunity to emphasize the First Amendment rights of children:

> First Amendment rights, applied in light of the special character of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years.[33]

The Court displayed its respect for the authority the states and school officials have to control conduct in the schools, but pointed out that this case deals not with conduct "that intrudes upon the work of the school or the rights of other students,"[34] but rather with "direct, primary First Amendment rights akin to 'pure speech.'"[35] A simple fear on the part of school officials that a disturbance may erupt is not sufficient ground to deny First Amendment rights:

> [I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute

> regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. . . .But our constitution says we must take this risk. . .[36]

The Court went on to reinforce the full constitutional rights of children:

> Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the state. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. . . . In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to free expression of their views.[37]

This reference to an "absence of a specific showing of constitutionally valid reasons to regulate their speech" suggests that in Tinker the Court was applying the clear and present danger doctrine. There was no showing by officials that the speech in question might lead to violence. In fact, the officials' position was based on the feeling that "schools are no place for demonstrations."[38] Since there was no danger of violence, under the clear and present danger test, the speech could not be proscribed.

It should be noted that in this case the Court made no attempt to differentiate between the First Amendment rights of adults and minors as Justice Stewart did in his concurring opinion in Ginsberg. Since the Court chose not to qualify its opinion, it "appears to have concluded either that minors do in fact possess the necessary capacity for claiming and exercising First Amendment rights or that the level of capacity is not crucial to making the threshold determination whether such rights are applicable to minors."[39]

The apparent differences in the holdings of Ginsberg and Tinker, which were decided within a year of each other, can be explained in terms of the nature of the expression involved; one dealt with obscenity (a form of communication not protected by the First Amendment) and the other with political speech (the very type of communication some commentators believe the First Amendment was expressly written to protect).[40]

However, at least one member of the Court was confused enough by the distance between the two holdings to remark; "I cannot share the Court's uncritical assumption that. . .the First Amendment rights of children are co-extensive with those of adults. Indeed, I had thought the Court decided otherwise just last term in Ginsberg. . ."[41]

This confusion, unmitigated by scholarly inquiry into the area, suggests that what is needed is a general theory of the First Amendment rights of children, a theory that might provide a test that could be applied to a variety of factual situations and still yield a unified approach to this complex area.

Such a theory is especially crucial at a time when administrative agencies such as the Federal Trade Commission and the Federal Communications Commission are enacting administrative laws in the belief that children must be protected from various types of communication.

In his book, The System of Freedom of Expression, Thomas Emerson refers to the need for such a test, at least when questions of obscenity are involved:

> [T]he full protection theory of the First Amendment cannot be applied. Nor, in view of the present lack of knowledge about the subject, can the clear and present danger test be employed, or any test based on the effect of obscenity on children. Even a balancing test would not be feasible. We are left then, at least for the time being, with little more than a due process test--that the restriction be a reasonable one.[42]

This paper suggests that a refined Fourteenth Amendment equal protection test is most suitable to determine the First Amendment rights of children.[43]

## Fourteenth Amendment and Equal Protection

The Fourteenth Amendment to the United States Constitution, ratified in 1868, was passed in reaction to President Johnson's veto of the Civil Rights Bill of 1866, which was to guarantee blacks the same civil rights as whites.

Although constitutional historians debate the many purposes of the framers of the Amendment, there is no doubt that, whatever else they may have wished to do, they did intend to validate the 1866 Act and thereby ensure that blacks had equality of legal status and voting rights.[44] Nevertheless, the language of the Amendment does go beyond the prohibition of racial discrimination:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[45]

By choosing language that went beyond the tangible harm they were seeking to redress, i.e., unequal treatment of blacks, the drafters of this Amendment provided generations of jurists and legal scholars with words that do not assert a specific rule but rather state a principle capable of a wide range of meaning.

One hundred years of interpretation of the Amendment and of its final Equal Protection Clause has pumped solidity into the abstract principle: application of the Amendment usually begins when a group or classification has been drawn by the State or by some agency thereof and people in the group claim that this grouping or "discrimination" denies them equal protection of the law.

A determination of whether equal protection has been denied must take into account the fact that "all legislation involves classification of some sort."[46] Even the most noncontroversial statutes, such as those punishing persons convicted of murder, divide people into groups according to conduct and motivation, and treat various groups differently. Accordingly, when applying equal protection, courst have operationalized "equal" to mean similar and "protection" to mean treatment. Thus the Fourteenth Amendment does not require that every single person be dealt with in exactly the same way but rather that similar persons be treated

> the Constitution of the United States. That, by virtue of this, it is not only the right, but the bounden and solemn duty of a state to advance the safety, happiness and prosperity of its people. . .by any and every act of legislation which it may deem to be conducive to these ends. . .[50]

However, there have been instances when the Court determined that a state's purpose was not legitimate.

In Loving v. Virginia[51] the Court pronounced the purpose of a state law illicit, and went on to explain that this examination of purpose is appropriate since the Equal Protection Clause requires more than a simple showing that all persons in a given class are treated similarly. In 1967, Virginia enforced a miscegenation statute, the purpose of which was to preserve the racial integrity of its white citizens. Virginia contended that the statute did not violate the Fourteenth Amendment because it punished equally both the white and black participants in the interracial marriage.

In repudiating Virginia's contention that the equal protection clause requires only equal treatment, the Court stated: "[W]e reject the notion that the mere "equal application" of a statute containing racial classifications is enough to remove the classification from the Fourteenth Amendment's proscription of all invidious racial discrimination."[52]

Then the Court went on to reject the stated intent of the Law: "There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification."[53]

This two-step test of the application of equal protection--determination first of a proper legislative purpose and second of a rational relationship between means and end--is termed the rational basis test. In addition to giving a presumption of validity to state purposes under the rational basis test, the Court also "rather generously defers to legislative judgment on classification."[54] This deferral is necessary since some measure of over- and underinclusiveness can be discovered in any law. It is up to the courts to decide how ill-fit the relationship between the criterion and the end must be before it is considered arbitrary; the rational basis test gives wide latitude to the states in this respect. This latitude appeared to wane in the late 1960's as the Supreme Court evolved a more stringent 14th Amendment standard and thus developed what has been called the "new equal protection."

The new test--called "close scrutiny"--is based on two doctrines: that of suspect classification and of fundamental rights. These two doctrines are essentially standards for determining the degree of fit required between means and ends. In contrast to the looser "rational basis test" which tolerates broad margins of over- and underinclusiveness, these two doctrines require a tighter fit.

A fundamental right is one which is either directly guaranteed in the Bill of Rights or emanates from one of these rights.[55] The Court has termed these "the basic civil rights of man, fundamental to our very existence and survival."[56] The right to vote,[57] to marry,[58] to marital privacy,[59] to procreation,[60] to abortion,[61] and to travel,[62] are some of the rights regarded as fundamental by the Court.

similarly.

The first step then, and the central one for equal protection analysis, involves determining which lines or classifications are permissible.[47] The key concept there is that of "relatedness." A continuum exists with "completely related" or "reasonable" at one end and "completely unrelated" or "arbitrary" at the other. A grouping is deemed "arbitrary" if the criterion upon which it is based is unrelated to the state's purpose for the legislation at issue. For example, if a state, for the purpose of curbing juvenile crime, imposed a curfew on all blue-eyed minors, then the state would be guilty of an "arbitrary" grouping since no relationship exists between blue-eyed juveniles and a tendency toward criminal conduct. On the other hand, a grouping is reasonable if its criteria are related to the state's purpose. For example, if a state imposed a fine on all convicted juveniles, the grouping of juveniles would be considered reasonable because a manifest relationship exists between convicted juveniles and crime.

An oversimplification results from using obvious examples: these illustrations suggest that relatedness and unrelatedness are discrete qualities when in fact they are not. It is usually not a question of whether the criterion and the end are related or unrelated, but rather one of how well they are related. A criterion can be considered arbitrary even when related to the purpose of the law if the relationship is distant. The Supreme Court and its commentators have labeled this distant relationship "ill-fit."[48]

Ill-fit is the consequence of two types of legislation: overinclusive and underinclusive. The former occurs when a statute picks out or affects more people than it should. Underinclusiveness results when a statute affects fewer people than it should. For example, if the federal Congress, upon a finding that saccharin is carcinogenic, prohibited the sale of soda pop containing saccharin, the law could be termed underinclusive since soda pop is only one of many foods containing the sweetener. If, on the other hand, the law prohibited the sale of all artifically sweetened soda pop, it would be overinclusive since saccharin is only one of many artifical sweeteners, some of which may not be carcinogenic.

It should be apparent that a state could use this process of fitting a means to an end to defend legislation of dubious quality. For example, if a state's purpose were to subordinate women to men rather than to choose the best students for admission to professional schools, then gender would be well-suited for deciding who should be admitted to the state's law and medical schools. Under the means-end test, this classification would be related and permissible. Thus in equal protection analysis it is necessary to go beyond a mere test of fit to a second step: identifying the state's purpose for the law and determining whether this purpose is legitimate.

In the great bulk of the cases it decides, the Supreme Court has deferred to the wisdom of state legislatures and assumed that these bodies, when legislating to protect the health, welfare and safety of their citizens, were guided by legitimate state purposes.[49] As the Court noted in a case questioning the limits of a state's police power,

> A State has the same undeniable and unlimited jurisdiction over all persons and things within its territorial limits, as any foreign nation, where that jurisdiction is not surrendered or restrained by

The suspect classification doctrine grew out of the Court's recognition that classifications drawn along racial lines are inherently suspect and carry 'a very heavy burden of justification."[63] Once the suspect classification principle had become clearly established in race cases, other forms of discrimination began to be attacked on the ground that they too were suspect. Race[64] and alienage[65] have been firmly established as suspect classifications. Illegitimacy,[66] sex,[67] and poverty[68] have been debated as to their suspectness.

Under the "new equal protection" strict scrutiny test, whenever either a suspect classification or a fundamental right is involved, a higher standard than that of the rational basis test must be used. This stricter standard requires that in order to survive review, the state law at issue must further a "compelling state interest" and must be less restrictive of federally protected rights than any alternative means of promoting that interest.[69]

Strict scrutiny can be contrasted with rational basis as follows: rational basis requires a proper legislative purpose, strict scrutiny requires a compelling state interest: rational basis requires a rational relationship between the means and the end, strict scrutiny requires that the state use the best and narrowest method available. Lastly, while rational basis gives a presumption of validity to the state, strict scrutiny places the burden of proving a compelling state interest on the state.[70]

This two-tiered approach to equal protection was very much the product of the Warren Court. Since the establishment of the Court of Chief Justice Burger, the strict scrutiny test seems reserved for a very few cases--usually involving racial discrimination. In its place the Court has adopted a test that is less demanding than strict scrutiny but more stringent than rational basis.

In two recent cases[71] the Court has applied this test. Both dealt with groups that, while not conclusively suspect, do represent classifications about which the Court has remained skeptical: gender and illegitimacy. This test would seem to have two parts. The first involves a determination that the group, while not suspect, "is analogous in many respects to the personal characteristics that have been held suspect when used as a basis of statutory differentiations."[72] The second part involves a judicial awareness that "these classifications are subject to scrutiny under the Equal Protection Clause."[73] Although "classifications based on this analogy . . .fall into a realm of less than strictest scrutiny. . . we also establish that the scrutiny is not a toothless one."[74] In order to withstand a challenge, the classification "must serve important government objectives and must be substantially related to the achievement of those objectives."[75]

The essential differences between this test (which can be termed "heightened judicial scrutiny") and the close scrutiny test are that this test involves "scrutiny," the other "close scrutiny;" this test involves a group "analogous" to suspect, the other suspect; and this test requires that legislation serve "important government objectives," and the other a "compelling state interest."

The Court has provided some commentary regarding what are <u>not</u> important government objectives: avoiding intrafamily controversy;[76] reducing the workload on courts;[77] and administrative ease and convenience.[78]

"Heightened Judicial Scrutiny" Applied to Children

As we suggested above, the development of a unified approach to children's First Amendment rights requires that a test be developed which can be applied to a number of legal issues involving freedom of speech vis-a-vis minors. The heightened judicial scrutiny test would seem appropriate because it provides a mechanism for discussing the exercise of a fundamental right by a group that, although not suspect, is regularly classified on the basis of personal characteristics.

Why should children constitute a classification that is at least suspicious if not suspect? Kenneth Karst[79] has suggested that there are two factors relevant in determining the degree of suspectness: one emphasizes the value of respect: classification on the basis of a trait that is immutable and highly visible leads to a system of thought dominated by stereotypes which often imply the inferiority of the person so categorized.

The other emphasizes the value of participation. This factor may seem unrelated to children since their ostensible participation in the democracy is precluded. But the First Amendment protection for freedom of expression is not limited to political expression. As Thomas Emerson has pointed out, "The principle also carries beyond the political realm. It embraces the right to participate in the building of the whole culture, and includes freedom of expression in religion, literature, art, science, and all areas of human learning and knowledge."[80] If the ability to actively participate in the democracy were a criterion for suspectness, then alienage, for example, could not constitute a suspect classification. But the Court has gone to great lengths to stipulate that although aliens may not vote, their categorization is suspect and they must be allowed to participate in institutions such as the state bar[81] and the civil service.[82]

Perhaps the strongest reason in favor of considering children suspect in this context is because discrimination against children, and the attendant limit on their right to receive information, invades one of the most fundamental interests of children: the interest in becoming an informed member of the adult society.[83]

Given that for the sake of the present argument, the classification of children is suspect enough to trigger the heightened judicial scrutiny test, two questions must be answered: (1) does the regulation at issue serve an important government objective; and (2) is the regulation substantially related to the achievement of that objective.

In order to apply these two criteria, it is instructive to look at a factual situation that the Supreme Court faced recently in Federal Communications Commission v. Pacifica Foundation.[84] At 2 o'clock in the afternoon a non-commercial radio station in New York City played the recording "Filthy Words" taped by satiric humorist George Carlin. The recording was played during a program about contemporary society's attitude toward language. Because the recording contained, according to Carlin, "the words you couldn't say on the public airwaves," immediately before its broadcast listeners were advised that it included "sensitive language that might be regarded as offensive to some."

A man who had heard the recording while driving with his fifteen-year-old son[85] complained to the FCC. In its response, the station explained that "Carlin is not mouthing obscenities, he is merely using words to satirize as harmless and

essentially silly our attitudes toward those words."[86]

The issue the Court faced in this case that is of importance to this discussion is whether speech that is concededly not "obscene" may be restricted as "indecent." The answer of the Court was affirmative: although the words used are not categorically excluded from radio, because of the presence of children in the audience indecent speech could be proscribed.[87] The ruling in this case is that the use of speech which is deemed indecent may be prohibited from daytime radio programming when presumably children are in the audience. Since the Court went to great length to define "obscene" as separate from "indecent" speech,[88] the assumption can be made that indecent speech is not outside First Amendment protection. Thus we reach the question of why the fundamental First Amendment rights of children can be so limited.

Under the heightened judicial scrutiny test, the two questions that must be answered pertain to the government objective and the relationship of the regulation to that objective. The objective of both the FCC and the Supreme Court in Pacifica would seem to be to protect children from a certain type of language.

According to the dicta of Bellotti, there are three circumstantial government objectives which may lead to the circumscription of children's constitutional rights: if a system makes a child particularly vulnerable, such as the adult court system would; if a child, through a decision, could cause himself harm; and if the reinforcement of parental authority so requires. The first objective is clearly not related to Pacifica. Neither is the third, for, in truth, this ruling removes all discretion from parents and gives it to a regulatory commission.

The second objective may pertain, for one could argue, although not strongly, that a child, by choosing to listen to a recording such as Carlin's could unwittingly do himself some undefined harm. Assuming that this is the objective of the ruling, it must now be determined if there is a substantial relationship between the regulation and the achieving of this objective.

What is the meaning of "substantial" in this context? The guideline falls somewhere between the reasonable relationship of the rational basis test and the requirement of the narrowest and best alternative of the strict scrutiny test. The question may be posed in this manner: is proscribing indecent language from daytime radio an effective way to keep children from doing themselves this undefinable harm? In the total absence of persuasive evidence, the substantialness of this relationship pales. Since this question cannot be answered strongly in the affirmative, it is apparent that the objective does not meet the heightened judicial scrutiny test of substantial relationship, and that, when this test is applied, the FCC ruling considered in Pacifica violates the First Amendment rights of children.

## Conclusion

A number of court cases are being decided and laws being passed which have an impact upon the First Amendment rights of children.[89] In addition, citizens' groups such as the national PTA and Action for Children's Television[90] and professional organizations such as the Council on Dental Health of the American Dental Association and the American Public Health Association[91] are lobbying

Congress for legislation which would limit the types of communication available to children. Congress in turn is pressuring federal agencies like the Federal Communications Commission and the Federal Trade Commission to make rules defining material permissible for children's consumption.

Although this trend seems to be gathering momentum,[92] there is as yet no mechanism for defining what the rights of children are and no approach which allows for the uniform application of those rights.

The heightened judicial scrutiny test would give lawmakers and judges alike guidelines to be used in insuring society's interest in the protection of children and the child's interest in becoming an informed member of the adult society.

FOOTNOTES

1. See Mussen, P. H., Conger, J. J. and Kagan, J., Child Development and Personality, (New York: Harper and Row, 1969) at 7. See also, Pikunas, J., Fundamental Child Psychology, (Milwaukee: Bruce Publishing Company, 1965) at 6-11.

2. Centuries of Childhood, (New York: Knopf, 1962) at 411.

3. Mussen, et al., at 7.

4. "Parental Consent Requirements and Privacy Rights of Minors: The Contraceptive Controversy," 88 Harvard Law Review 1001, 1008 (1975) hereinafter cited as "Parental Consent Requirements" .

5. See Tinker v. Des Moines, 393 U.S. 503 (1969) and In re Gault, 387 U.S. 1 (1967).

6. Ginsberg v. New York, 390 U.S. 629, 636 (1968).

7. 393 U.S. 503, 511 (1969).

8. Id.

9. Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 74 (1976).

10. 61 L.Ed. 2d 797 (1979).

11. Id. at 807.

12. Id.

13. Id. at 808.

14. Id. at 807.

15. Id. at 808.

16. Id. at 810.

17. Id. at 813.

18. Id.

19. Id. at 812.

20. 390 U.S. 629 (1968).

21. "Variable obscenity" is the name given to laws such as that of New York.

22. 390 U.S. 629, 633 (1968).

23. Id. at 639.

24. Id. at 640.

25. Id. at 635.

26. Id. at 641.

27. Mr. Justice Holmes authored the clear and present danger doctrine in Schenck v. United States, 249 U.S. 47 (1919) as a guide to the boundaries of protected speech. Under the doctrine, political expression can be punished when the circumstances are such that they "create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."

28. 390 U.S. 629, 641 (1968).

29. Id. at 649-50.

30. "The Supreme Court: 1967 Term," 82 Harvard Law Review 63, 127 (1968).

31. Id. at 127-28.

32. 393 U.S. 503 (1969).

33. Id. at 506.

34. Id. at 508.

35. Id.

36. Id.

37. Id. The notion that children have obligations to the state adds emphasis to the Court's determination that children have constitutional rights. To have responsibilities to the state suggests that one is a participating, respected citizen. See Karst, K. L., "The Supreme Court: 1976 Term," 91 Harvard Law Review 1, 8-11 (1977).

38. Id. at 509 note 3.

39. "Parental Consent Requirements," at 1009.

40. See generally, Meiklejohn, A., Political Freedom, (New York: Harper and Row, 1948).

41. 393 U.S. 503 (1969).

42. Emerson, T. I., The System of Freedom of Expression, (New York: Vintage Books, 1970) at 502.

43. The first specific transfusion of First Amendment rights into the Fourteenth Amendment by way of the due process clause was achieved in Gitlow v. People of State of New York, 268 U.S. 652 (1925). In dicta in the case, Mr. Justice Stanford "offhandedly extended the limitations on legislation curtailing freedom of expression binding on the federal government by reason of the First

Amendment to the states. . ." (Gillmor, D. and Barron, J., Mass Communication Law (St. Paul: West Publishing Co., 1979) at 21.) In Gitlow the Court said that "for present purposes" freedom of speech and of the press are among the fundamental rights and liberties protected by the due process clause of the Fourteenth Amendment from impairment by the states. 263 U.S. 652, 666 (1925).

44. Karst, at 11-12.

45. U.S. Constitution, Amendment XIV S I.

46. Corwin, E.S., The Constitution and What it Means Today, revised by Chase, H.W., and Ducat, C.R., (Princeton, New Jersey: Princeton University Press, 1974) at 403.

47. Fiss, O.M., "Groups and the Equal Protection Clause," 5 Philosophy and Public Affairs 107, 108-09 (1976).

48. Id. at 111.

49. The principle of separation of powers among our three branches of government is not specifically declared in the federal Constitution: it is implicit in the organization of the first three articles. (1) "All legislative powers herein granted shall be vested in the Congress of the United States." (2) "The executive power shall be vested in the President of the United States." (3) "The judicial power shall be vested in one Supreme Court and in such inferior courts as the Congress shall. . .ordain and establish."
From this separation is derived the doctrine that certain functions, such as the legislative one may properly be exercised by only a particular branch of government and that one branch may not interfere with another by usurping its powers. Because of this separation of powers, augmented by the authority of the Tenth Amendment that "All powers not delegated to the United States by the Constitution. . .are reserved to the States respectively. . .," the Supreme Court routinely defers to the wisdom of state legislatures and assumes that these bodies are guided by legitimate state purposes.

50. The Mayor of the City of New York v. Miln, 36 U.S. 102, 139 (1837).

51. 388 U.S. 1 (1967).

52. Id. at 8.

53. Id. at 11.

54. Mason, A., and Beaney, W., American Constitutional Law, Englewood Cliffs, New Jersey: Prentice-Hall, Inc., 1973) at 461.

55. As the Court pointed out in Griswold v. Connecticut, "[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance." 381 U.S. 479, 484 (1965). In this case, the Court viewed privacy as emanating from the First, Third, Fourth, Fifth and Ninth Amendments.

56. Loving v. Virginia, 388 U.S. 1, 12 (1967).

57. Harper v. Virginia Board of Elections, 383 U.S. 663 (1966).

58. 388 U.S. 1 (1967).

59. Griswold v. Connecticut, 381 U.S. 479 (1965).

60. Skinner v. Oklahoma, 316 U.S. 535 (1942).

61. Roe v. Wade, 410 U.S. 113 (1973).

62. Shapiro v. Thompson, 394 U.S. 618 (1969).

63. Loving v. Virginia, 388 U.S. 1, 9 (1967).

64. Id.

65. Graham v. Richardson, 403 U.S. 365 (1971).

66. Levy v. Louisiana, 391 U.S. 68 (1968).

67. Reed v. Reed, 404 U.S. 71 (1971).

68. San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973).

69. Gunther, G., "In Search of an Evolving Doctrine on a Changing Court: A Model For a Newer Equal Protection," 86 Harvard Law Review 1, 105-06 (1972).

70. Fiss, at 116. A compelling state interest is a purpose "so important that it excuses imperfect means. This doctrine seems to have its roots in the Japanese Relocation Cases Korematsu v. United States, 323 U.S. 214 (1944). where the Supreme Court permitted the use of a racial or national-origin criterion (clearly a suspect one) for determining who should be relocated and otherwise confined. The state purpose--self-preservation of the nation in time of war--was deemed to be of sufficient importance to excuse the overinclusiveness (not all Japanese were security risks) and the underinclusiveness (those of German origin might be as much of a security risk)."

71. Craig v. Boren, 429 U.S. 190 (1976) and Trimble v. Gordon, 430 U.S. 762 (1977). Craig involved a gender-based classification and Trimble dealt with a state law that made different provisions by intestate succession. In Craig the Court used the test outlined in Reed v. Reed, 404 U.S. 71 (1971) as its guide.

72. 430 U.S. 762, 767 (1977).

73. 429 U.S. 190, 197 (1976).

74. 430 U.S. 762, 767 (1977).

75. 420 U.S. 190, 197 (1976).

76. Reed v. Reed, 404 U.S. 71 (1971).

77. Id.

78. Stanley v. Illinois, 405 U.S. 465 (1972).

79. Karst, at 22-25.

80. Emerson, at 7.

81. In re Griffiths, 413 U.S. 717 (1973).

82. Sugarman v. Dougall, 413 U.S. 634 (1973).

83. This reasoning parallels that of Karst at 33.

84. 438 U.S. 726 (1978).

85. The issue of a "mature" v. an "immature" minor is not discussed here although it may be pertinent given the age of the youth involved in Pacifica. See Bellotti v. Baird, 61 L. Ed. 2d 797, 803 (1979).

86. 438 U.S. 726, 730 (1978).

87. Id. at 750.

88. "Prurient appeal is an element of the obscene, but the normal definition of 'indecent' merely refers to non-conformance with accepted standards of morality." Id. at 740.

89. Much of this litigation revolves around the rights of high school journalists. For a discussion of such cases see Nelson, J. (ed.), The Report of the Commission of Inquiry into High School Journalism (Robert F. Kennedy Memorial), (New York: Schocker Books, 1974). State and local laws have been upheld which zone "adult" material to keep children away from it, even when such material is not obscene. See Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976).

90. See, for example, Children's Television Report and Policy Statement," 31 R.R. 2d 1228 (1974).

91. See "Federal Trade Commission Staff Report to TV Advertising to Children," 49 Advertising Age 73 (February 23, 1978).

92. For example, the number of complaints regarding programming to children brought to the FCC and reported in Pike and Fisher Radio Reports is as follows: two in 1974, one in 1975, three in 1976 and three in 1977. See Id. for groups petitioning FTC for regulation of advertising of sugared products aimed at children. See generally, Writers Guild of America West, Inc. v. FCC, 423 F. Supp. 1064 (C.D. Calif. 1976) for a discussion of the pressure put on the FCC with regard to the "family hour."